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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 100

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER COMPANY,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

SAMUEL T. ANSELL,
Counsel for Petitioners.

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No. 1200

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Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Claims entered in this case October 1, 1945.

Opinion Below

The opinion of the Court of Claims (R. 86-98) is reported in 62 F. Supp. 432.

Jurisdiction

The judgment of the Court of Claims sought to be reviewed was entered October 1, 1945 (R. 98). A motion by the petitioners for a new trial was denied February 4, 1946 (R. 99). The jurisdiction of this Court is invoked

under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented

1. Petitioners and the United States entered into an agreement upon a government standard form contract covering the construction by petitioners of the first development of the Grand Coulee Dam (R. 72, Fdg. 2; Exhibit "A" annexed to Petition). Article 15 of such contract contains an agreement between petitioners and the United States for final and conclusive decision by the head of the department of all disputed contract questions, both of fact and law (Appendix "A," *infra*, p. 25; R. 79, Fdg. 14; R. 96-97). Petitioners sued in the Court of Claims on disputed contract questions without prior decision by the head of the department (R. 95-97). On these facts arise two closely related questions:

a. Whether the head of the department can make final and conclusive decisions on questions of law arising under government contracts; and if not then—

b. Whether a contractor, who has bargained for final and conclusive decisions by the head of the department on *all* questions, both fact and law, is required, before bringing suit in the Court of Claims, to obtain a decision by the head of the department which settles only questions of fact—a procedure not agreed upon between the parties.

2. Petitioners, without admitting the validity or applicability of Article 15 of the contract, appealed to the head of the department from a decision by the contracting officer on 28 claims for breach of the contract (R. 87-89, 135-140, 141-143). While the claims were pending for decision by

the head of the department, petitioners brought suit in the Court of Claims (R. 1, 84). Throughout the consideration of the claims by the contracting officer petitioners complained repeatedly to the head of the department that the contracting officer was arbitrary and unfair in his handling of the claims and that it was his avowed purpose to build a defense to the claims rather than to decide them on their merits (R. 147-149, 150-153, 153-159, 160-163). These protests went unheeded by the head of the department; his only reply as characterized by the court below being "in bad temper" and indulging "in a wholly irrelevant and improper reflection upon counsel" for petitioners (R. 90, 147-160, 164, 204-205, 208-209). The department head's attitude toward, and conception of fair dealing with, the petitioners, their counsel, and their claims is further shown by his own testimony: it was the duty of a contracting officer considering claims under Article 15 to require a claimant to make out his case by a preponderance of the evidence (R. 203); he (the department head) would accept more readily the statement of a government official than the statement of a witness for the contractor (R. 204); he believed that the immediate interests of a contracting officer engaged in considering claims under Article 15 lay in spending new money rather than in correcting past mistakes (R. 207); the statement of petitioners' counsel made formally to him that the contracting officer's representative had advised counsel that the time being consumed in the consideration of the claims was necessary to prepare the best defense possible was just a "further building-up" of what counsel was apparently preparing to urge in the Court of Claims (R. 208); it was a fair inference from a telegram sent by him to petitioners' counsel that he thought

counsel was disloyal to the government in pressing these claims (R. 209-210); in imputing disloyalty to petitioners' counsel in this telegram, he was "hitting back" for so many offensive letters he had received from counsel (R. 210); whereas at that time he had received three letters from petitioners' counsel making the same charge against the contracting officer of constructing the best defense possible, to none of which did he ever reply except through subordinates and then only to state that action on the claims was being expedited (R. 147-157, 164). The question thus presented is whether, assuming the validity and applicability of Article 15 of the contract, these facts standing uncontroverted in the record made a sufficient showing of prejudice and bad faith in the head of the department to justify petitioners in suing in the Court of Claims without a decision by the head of the department.

3. Whether the Court of Claims may properly refuse to consider claims for damages sustained by contractors under a standard form government construction contract upon the ground that the contractors had unjustifiably abandoned their appeal to the head of the department required under the terms of Article 15 of the contract without making findings in respect of the bad faith of the department head and the other inadequacy of the appeal procedure established by Article 15 as to which allegations are made by the contractors (R. 15-17) and substantial evidence is contained in the record (R. 101-217).

If a writ of certiorari is granted, petitioners intend to submit argument on the following additional questions:

4. Whether Article 15 of the contract, assuming it to be valid, applies to petitioners' claims for breach of the contract.

5. Whether, upon the facts presented on this record, the appeal to the head of the department has been abandoned.

6. Whether an order for changes issued to petitioners by the government after the work was well under way, changing the construction undertaken by petitioners from a low dam to the low development of a high dam (Appendix "C," *infra*, pp. 26-27, R. 76, Fdg. 11), dropped Article 15 as a provision of petitioners' contract.

Statement of the Case

1. On July 16, 1934, the petitioners entered into a contract with the government, signed by R. F. Walter, Chief Engineer, Bureau of Reclamation, representing the Government (R. 72, Fdg. 2) and approved by Harold L. Ickes, Public Works Administrator (Exhibit "A" annexed to Petition). The contract was for the construction of the "first development" of the Grand Coulee Dam on the Columbia River (R. 72, Fdg. 2). The contract consisted of Government Form PWA No. 51, Specifications No. 570, and numerous drawings (Exhibit "A" annexed to Petition). With a few exceptions, it was a unit price contract (R. 72, Fdg. 3). Petitioners were to do the work and furnish the labor, plant and equipment; the government was to supply the material (R. 72, Fdg. 2). The stated consideration was $29,399,301.50 (R. 72, Fdg. 2).

2. The structure called for by petitioners' contract was for a low dam—a core of the contemplated high dam which by the "second development" was to be constructed by building over the low dam a high concrete cowl extending the low dam to the height and width of the high dam (R. 74, Fdg. 9; R. 76, Fdg. 11). The high dam was to be a

power dam. Petitioners began work October 4, 1934 (R. 73, Fdg. 5). On June 5, 1935, petitioners received Order for Changes No. 1, signed by the contracting officer (R. 76-77, Fdg. 11) and approved by Secretary Ickes (Exhibit "B" annexed to Petition), which effected a complete change (Appendix "C," *infra*, pp. 26-27): the entire dam was to be built as a single structure; the dam was to be not only a power dam but an irrigation dam as well, with pumphouses, pumps and equipment for lifting the water from the pool into the Grand Coulee of the Ice Age for supplying water to the arid lands beyond (Exhibits "A" and "B" annexed to Petition). Of this high dam petitioners were directed to build the lower part and the foundations of the power and pumphouses (Exhibit "B" annexed to Petition). This order stated that, "In lieu of constructing the Grand Coulee Dam and the appurtenant works in accordance with the drawings and Specifications No. 570 you are directed to construct the dam and appurtenant works in accordance with the revised designs as shown on the attached general drawings • • •" (Appendix "C," *infra*, pp. 26-27; R. 76-77, Fdg. 11). The Order further provided that all work shall be done under the detailed instructions contained in Specifications No. 570 where these were applicable as determined by the contracting officer and otherwise in accordance with new instructions and drawings which were to be furnished (Appendix "C," *infra*, pp. 26-27; R. 77, Fdg. 11). The Order also fixed the time for the adjustment of compensation (Appendix "C," *infra*, pp. 26-27; R. 77, Fdg. 11).

This dam is the largest man-made structure on earth (R. 78, Fdg. 13). The water of the Columbia river impounded by the dam extends 151 miles to the Canadian border (R. 73, Fdg. 4). It is 4300 feet long at the

crest, 550 feet high, and 500 feet wide at the base (R. 78, Fdg. 13). Petitioners' organization consisted of over 5000 workmen, working in three shifts daily (R. 73, Fdg. 7). The government's organization consisted of from 500 to 1000 officers and men (R. 73, Fdg. 7).

3. Work upon the new structure described by Change Order No. 1 proceeded immediately (R. 76, Fdg. 11). In December, 1935, an "Adjustment of Compensation" was entered into by the parties and approved by the Secretary (R. 77, Fdg. 12). This document carried many new design drawings and some twenty pages of new specifications (Exhibit "B" annexed to Petition). This new and larger work required by Order for Changes No. 1 and the Adjustment of Compensation resulted in increasing the consideration stated in the original contract from approximately $29,000,000 to almost $40,000,000 (R. 76, Fdg. 11). The government accepted petitioners' work March 21, 1938 (R. 73, Fdg. 5).

4. Differences as to the work required to be performed under the contract and as to other matters relating thereto arose from time to time (R. 79-80, Fdg. 16). Many of these differences were adjusted by informal communication between the contracting officer's representative on the job and the petitioners' representatives (R. 79-80, Fdg. 16). Others were not adjusted in such fashion, and protests were made to the contracting officer or to the contracting officer's representative (R. 80, Fdg. 16). When adjustment could not then be reached and adverse decision was made by the contracting officer, the petitioners upon occasion appealed in writing to the Secretary of the Interior (R. 80, Fdg. 16; R. 106-108; Plaintiffs' Exhibit "J," pp. 17-21, 256, 581-582; Appendix "E," *infra*, pp. 38-40), submitting

their appeal to the contracting officer for transmittal to the Secretary as required by the contracting officer (R. 106-107). The contracting officer had no fixed rule for handling appeals but, as in the case of one claim which is the subject of this suit, might receive an appeal to the Secretary of the Interior and fail to transmit it to the Secretary because, "We did not feel this matter would ripen into a claim that was necessary to submit to the Secretary at that time, in view of the fact that there were numerous other claims, which, in the orderly process, would be transmitted to the Secretary, eventually" (R. 107-108; Appendix "E," *infra*, pp. 31-40). In this instance, petitioners had no further word from the Bureau of Reclamation or the Department after submitting their appeal (R. 106-107).

5. Order for Changes No. 1 did not expressly bring forward the provisions of the original contract and specifications for protest and appeal (Appendix "C," *infra*, pp. 26-27; R. 76-77; Exhibit "B" annexed to Petition).

6. The petitioners, on November 22, 1937, formally filed claims which constitute causes of action in suit with the head of the department (R. 80, Fdg. 17). The petitioners accompanied the claims with a letter in which they charged the contracting officer and other government representatives with wrongful, unfair, and arbitrary conduct (R. 87-88). No action was taken by the head of the department in respect of the petitioners' charges (R. 185, 194). The acting head of the department referred the claims and letter back to the contracting officer (R. 80, Fdg. 17), although such claims had previously been decided by the contracting officer (R. 93; Plaintiffs' Exhibit "J", pp. 3, 82, 91, 154, 155, 158, 202, 250, 253, 262, 265, 285, 296, 309, 312, 327, 368,

370, 373, 388, 419, 481, 487, 488, 490, 492, 576). Between November 22, 1937, and February 14, 1938, ten additional claims of the same character were sent to the head of the department, who also referred them to the contracting officer (R. 88). By letter of April 13, 1938, three additional claims were filed with the contracting officer (R. 88-89). The amount represented by the claims thus submitted to the Secretary and the contracting officer was in excess of $5,000,000 (R. 89). The petitioners pressed for early administrative consideration of the claims (R. 97). The policy of the head of the department and the contracting officer was to give priority to new projects and contracts and to postpone the consideration of claims growing out of work already done (R. 207). The petitioners also insisted that the contracting officer grant them and their officers and witnesses a hearing upon the merits of the claims (R. 89).

7. In July, 1938, the contracting officer informed the petitioners' representatives that a hearing was superfluous (R. 89, 90-91). On July 14, 1938, the petitioners in writing complained of such attitude to the head of the department and reported that the contracting officer had clearly indicated to them that he intended to construct such defense against the claims as the evidence available to him might seem to him to justify (R. 91). The letter of July 14, 1938, and later letters dated August 11 and October 12, 1938, requesting the head of the department to take remedial action respecting the contracting officer were acknowledged by subordinates without making reference to this matter (R. 147-157, 164). Counsel for petitioners renewed this request by telegram of October 23, 1938, to the Secretary who responded in terms of resentment, anger, and insult (R. 90, 157-160). The head of the de-

partment refused to exercise remedial supervision over the contracting officer and testified that he regarded the requests for such action and the complaints against the contracting officer as a personal and official affront to him in "hitting at me" over the contracting officer's shoulder (R. 210).

8. Under date of December 5, 1938, the contracting officer made his "Findings of Fact and Decision" and transmitted a copy to the petitioners' counsel (R. 80, Fdg. 18). On January 4, 1939, petitioners appealed from these findings to the head of the department without recognizing any requirement therefor and with full reservation of their rights to have all issues adjudicated by the proper courts (R. 82, Fdg. 21; R. 93). The Secretary was so rushed that he could not see counsel on the subject of procedure (R. 172). He turned the claims over to Mr. Margold, the department solicitor, for consideration and report (R. 82-83, Fdg. 23). The department solicitor saw counsel February 6, 1939 (R. 83, Fdg. 23). On this occasion, counsel requested a full hearing with the right to offer the oral testimony of witnesses and to examine the contracting officer on the facts and any of his subordinates from whom he had obtained the facts used by him in support of his findings (R. 83, Fdg. 23). Petitioners' counsel understood that Mr. Margold rejected such procedure (R. 94, 111-112). Accordingly, counsel wrote the Secretary February 7, 1939, advising him in detail of the nature of the hearing counsel had requested Mr. Margold to conduct and of counsel's understanding that Mr. Margold had denied this request (R. 94, 171, 174). By letter of February 11, 1939, to petitioners' counsel, Mr. Margold informed counsel that he had "decided to grant, without any qualification, the request which you made during your personal conference with me last

Monday for a full and complete hearing of the merits of the controversy" (R. 94). This letter also informed counsel that Mr. Margold contemplated an arrangement whereby an attorney of the Department of Justice would represent the government's interests (R. 94, 174-175). In this letter, the solicitor stated that circumstances had arisen which required him immediately to leave for California and which "may delay my return for a few weeks" (*ibid.*). On February 16, petitioners' counsel replied that the solicitor's decision in respect of the hearing was entirely agreeable (R. 94). On February 24, the solicitor in response to counsel's request agreed that counsel and Mr. Miller, the attorney of the Department of Justice named by the solicitor to represent the government, might have pre-trial conferences for the purpose of stipulating such facts as they might agree upon (R. 117, 177-178). Counsel for petitioners then visited the Department of Justice for the purpose of thus conferring with Mr. Miller and was there informed that the solicitor had not made, and could not make, arrangement in which the Department of Justice would represent the government's interest at the hearing (R. 94, 126, 179-180).

9. On February 27, 1939, counsel wrote the acting head of the department, Mr. Slattery, relating the abortive results of the solicitor's arrangement as counsel learned them upon his visit to the Department of Justice (R. 94). On March 9, 1939, the acting head of the department, Mr. Burlew, wrote counsel saying that the falling-through of that arrangement in no way affected the hearing, except in so far as it concerned the fixing of a date, and concluded by writing that "It appears that there now exists no reason why a date may not be set for the inauguration of the hearing. Accordingly, *in the near future* you will be notified

by the solicitor as to a date which is agreeable to him and advised as to the procedure which is deemed appropriate." (Emphasis supplied) (R. 95). Nothing more was heard from the department or from the solicitor until, on May 1, 1939, petitioners filed their original petition in the Court of Claims, over 17 months after the submission of the original 16 claims to the Secretary and 78 days after Mr. Margold left Washington to be gone a few weeks (R. 95).

10. The amended petition was filed in the Court of Claims February 14, 1940 (R. 10). The court referred the case to a commissioner, who took over 8,000 pages of testimony (R. 71). The court in its opinion rested its decision on the ground that Article 15 of the contract obligated petitioners to appeal the contracting officer's decision to the head of the department and to exhaust that appeal and that, having abandoned the appeal without justification, they could not resort to the Court of Claims (R. 96-97).

Specification of Errors to Be Urged

First Group

The court erred—

1. In failing to hold that Article 15 of the contract is invalid as an unlawful impairment of the jurisdiction of the Court of Claims; and

2. In failing to hold that Article 15 is invalid as *ultra vires* the authority of the Secretary of the Interior because thereby he presumes the power (a) to limit and control the jurisdiction of the Court of Claims and (b) to make decisions final and conclusive upon the United States.

Second Group

The court erred—

3. In failing to hold that Article 15 was rescinded by Change Order No. 1.

4. In failing to hold that petitioners' compliance with Article 15 was waived by the government; and

5. In failing to find that petitioners' compliance with Article 15 was prevented by the government.

Third Group

The court erred—

6. In failing to hold that Article 15, construed in the light of paragraph 14 of Specifications 570, does not contemplate or require appeal of the decisions of the contracting officer to the head of the department.

7. In holding that Article 15, even if it is not valid to authorize final decisions upon questions of law, is nevertheless valid to authorize final decisions upon questions of fact; and

8. In failing to hold that, if Article 15 is invalid to authorize final decisions upon questions of law, it is invalid to require the submission of any questions to the head of the department for any purpose.

Fourth Group

The court erred—

9. In failing to consider and determine the distinct causes of action upon their substantive merits.

10. In failing to consider the testimony of Secretary Ickes as to his unfairness, bias, and prejudice.

11. In failing to hold that Secretary Ickes was so biased, prejudiced, and arbitrary that the appeal to him was futile.

12. In finding that it had not been proved that the contracting officer was arbitrary or capricious or lacking in good faith.

13. In failing to find that the head of the department failed to exercise effective control over his subordinates to relieve petitioners of the effect of the arbitrary conduct of such subordinates.

14. In finding that petitioners abandoned their appeal to the head of the department.

15. In failing to find that the procedure of Article 15 was inadequate to accomplish its purposes.

16. In failing to find that petitioners were excused from persisting in their appeal to the head of the department, assuming that compliance therewith was not waived or prevented by the government.

17. In finding that the head of the department did not fail or refuse to entertain petitioners' appeal.

18. In failing to find that the failure of the solicitor of the department to set a day for the commencement of hearing on appeal was unreasonable; and

19. In failing to enter judgment for the petitioners as to each cause of action.

Reasons for Granting the Writ

The questions here involved are of far-reaching importance. They affect not only the field of construction contracts but also the even broader field of government contracts in general. This Court has consistently recognized the substantial nature of questions arising out of the application of Article 15 and similar contractual provisions and the desirability of settlement of such questions by the highest judicial authority. It has clarified the attitude of the courts upon most of the questions arising under Article 15 when the application of the provision is limited to fact through the frequent exercise of its jurisdiction to review judgments of the Court of Claims. *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *United States* v. *Callahan Walker Constr. Co.,* 317 U. S. 56; and numerous other cases. It is now being increasingly confronted, however, with the desirability of settling questions under Article 15 when it is employed without limitation upon the authority of executive officers and employees finally to determine all questions. *United States* v. *McShain,* 308 U. S. 512; *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Beuttas,* 324 U. S. 768. The case herein, as disposed of by the Court of Claims, raises fundamental questions affecting the inherent availability of Article 15 as a proper and effective provision for the just determination of disputes in respect of law, economy, and public administration. It is, at least, salutary that these questions be finally settled as to the standing and scope of the Article in law. This is so for the guidance of the government. *S. J. Groves & Sons Co.* v. *Warren,* 135 F. (2) 264. It is so for the direction of the contracting industry, basic to the welfare of the Nation, which finds its most considerable opportunities in these times in the field of government contract. It is especially so for the assurance of final justice to these petitioners who are now de-

prived of all recourse to any tribunal which may determine the merits of their claims totalling over $5,000,000, claims which have never been considered by any public office or officer other than the contracting officer out of whose conduct all of them arose.

In the premises and with specific reference to the particular questions presented in this case, the petitioners assign the following reasons for granting the writ:

1. At the outset it must be determined whether the head of the department can make final determinations on all questions. If he cannot, the question is squarely presented as to whether Article 15 would then still impose the necessity of appealing to him before suing in the Court of Claims. The latter question, although of the utmost importance to those contracting with the government, has never been presented to this Court for decision; and the question whether the head of a department can make final decisions on questions of law has not been, but should be, settled by this Court. This latter question was expressly left open in the recent case of *United States* v. *Bcuttas,* 324 U. S. 768, although the Court noted in its opinion that theretofore the decisions of this Court had not explicitly drawn any distinction between questions of fact and law. This leaves uncertainty as to the state of the law, especially in view of this Court's per curiam decision in *United States* v. *McShain,* 308 U. S. 512. The confusion on this point is acutely reflected in the recent wide contrariety among the decisions of the Court of Claims.

These two related questions present the pressing need for exploration and determination by this Court of the extent, if any, that the doctrine of the exhaustion of administrative remedies is applicable to consensual agreements.

2. The decisions of the court below that petitioners were not justified in suing in the Court of Claims without a

decision by the head of the department is probably in conflict with the decisions of this Court. *United States* v. *Smith*, 256 U. S. 11, 16; *Ripley* v. *United States*, 223 U. S. 695, 702; cf. *United States* v. *Blair*, 321 U. S. 730.

It is submitted that the degree of prejudice and bad faith in the head of the department here was as great as was found by this Court to have existed in the *Smith* and other cases decided by this Court. It would have been as useless here, as it was found by this Court to have been in the *Smith* case, for petitioners to have tried to get a fair decision from the head of the department. The court below overlooked the view admittedly taken by the head of the department with respect to the contract and his functions in making decisions thereunder. Although the contracting parties stood on an equal footing, the department head would have required petitioners to make out their case by a preponderance of the evidence, and in making his decision on the claims he says that he would accept more readily the statement of a government official than the statement of a witness for the contractor. These views, it is submitted, go to the very roots of our judicial system's conception of fair dealing, and this Court has held that the presupposition of fair dealing underlies government contracts. *Ripley* v. *United States*, 223 U. S. 695, 702; *United States* v. *Smith*, 256 U. S. 11, 16; *United States* v. *Blair* (dissenting opinion), 321 U. S. 730, 738-739.

It is submitted that in substance the basis for the decision in the *Smith* and other applicable cases decided by this Court is that forfeitures are to be abhorred, and for that reason the doctrine in the *Smith* case must be strictly and vigorously adhered to by the courts that apply it. Should the decision of the court below be allowed to stand petitioners would be denied all right to have their claims adjudicated on the merits. This, in fact and result, would constitute that forfeiture which the law abhors.

3. The Court of Claims avoided making any finding as to the bad faith on the part of Secretary Ickes. Government contracts are phrased so as by their terms to condition access to the courts for determination of the merits of all controversy which may arise thereunder upon complete exhaustion of an administrative procedure except when the bad faith of the head of the governmental department concerned may be shown. Under these circumstances it is manifest that, where the prescribed procedure is admittedly not followed by a contractor who assigns, for excuse therefrom, that compliance with the procedure would be futile because of the bad faith of the departmental head and adduces substantial evidence in the record tending to show the existence of that bad faith, the essential question in the case is whether the requisite bad faith has been proved. Thus, it is equally manifest that an answer to this question which may be and frequently is determinative of every issue is of greatest consequence to the contractor. It follows, therefore, that it is an important question of the law of government contracts whether, when pertinent allegations are made and substantial evidence is of record, the Court of Claims may properly omit to make its finding as to the existence or non-existence of bad faith in declining to consider the merits of disputes arising under contracts which are presented to it for determination.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

SAMUEL T. ANSELL,
Counsel for Petitioners.

May 3, 1946.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1200

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER COMPANY,
Petitioners,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below, Jurisdiction of the Court, Statement of the Case, and Specification of Errors to Be Urged.

Reference to the opinion of the Court of Claims is made in the Petition, *ante,* page 1. A statement of the grounds on which the jurisdiction of this Court is invoked is also contained in the Petition, *ante,* pages 1-2. A statement of the case is contained in the Petition, *ante,* pages 5-12. A specification of errors intended to be urged is contained in the Petition, *ante,* pages 12-14. Accordingly, these subject-matters are not set forth in this brief.

Argument

The petitioners believe that a supporting brief in addition to the statements embodied in Reasons for Granting the Writ, Petition, *ante*, pages 15-18, will be helpful only in respect of the third reason which is, in substance, that this Court should determine whether the Court of Claims may decline to adjudicate disputes arising out of a government contract where appeal to the head of the department was provided but was not completed without making findings in respect of the bad faith of the head and of the other inadequacy of the appeal procedure as to which allegations are made and substantial evidence is contained in the record. They believe that the presentations of the first and second reasons in the Petition, *ante*, pages 16-17, are full and concise statements of these particulars and need no enlargement here. Accordingly, this brief is directed to a further development of the third reason alone and is intended only to supplement the statement of that reason in the Petition, *ante*, page 18.

I

The petitioners alleged in the Court of Claims not only that the Secretary of the Interior manifested that he was incapable of giving just and fair consideration to the petitioners' appeals but also that they complied with the procedure established in the contract for the administrative settlement of disputes where such compliance was not impossible (R. 15-16). The Court of Claims made no finding upon this allegation in refusing to consider the petitioners' claims upon their merits although much evidence upon the subject was adduced. The impossibility of the petitioners' compliance with the settlement procedure was shown by the evidence to have been the result of the conduct of the contracting officer and the Secretary of the Interior in dealing

with the petitioners' protests and appeals made during the course of the work. This evidence shows:

Numerous disputes as to the work required to be performed and as to other related matters arose. Some of these differences were adjusted to the satisfaction of the parties by informal communication between the contracting officer's representative on the job and the petitioners' representatives. The disputes remaining unadjusted through this informal means are those embodied in the causes of action which are the substance of the petition in the court below. Those disputes which were not adjusted through informal communication were treated in a variety of ways: one (part of the seventh cause of action) was appealed by the petitioners from an adverse decision of the contracting officer to the Secretary of the Interior "in accordance with Article 15" but the contracting officer, without the knowledge of the petitioners, failed ever to transmit it to the Secretary;[1] two (the first and twenty-ninth causes of action for which a total judgment of $1,188,349.17 was asked) were appealed in the fall of 1937 from adverse decisions of the contracting officer or of his representative to the Secretary of the Interior but were never acted upon by him (Plaintiffs' Exhibit "J," pp. 17, 582); three (the fifth, eleventh, and seventeenth causes of action for which a total of $525,608.16 was asked) were protested to the contracting officer under paragraph 14 of the specifications (Appendix "B," *infra*, pp. 25-26) in each case over eight months prior

[1] The treatment accorded this appeal taken entirely within the literal requirements of Article 15 as interpreted to the petitioners by the contracting officer is such conclusive evidence of abandonment of Article 15 by the government during the course of the work as to require the entire history of it to be emphasized to this Court. Accordingly, this history is presented in Appendices "D" and "E", *infra*, pp. 27-40, where the contracting officer's findings and decision including the protests and original appeal are set forth and in the testimony of the respondent's witness Harper which is printed in the record (R. 104-108).

to completion of the work, but the contracting officer failed to render any decision thereon (Plaintiffs' Exhibit "J," pp. 191-203, 330-331, 404-405); and four (the fourth, tenth, thirteenth, and eighteenth causes of action for which a total of $947,788.31 was asked), arising near the completion of work, were submitted to the Secretary of the Interior for determination after adverse decision by the contracting officer in the general submissions hereinafter described but were then sent by him to the contracting officer for another decision (Plaintiffs' Exhibit "J," pp. 137-157, 306-312, 364-374, 444-492).

By letters of November 22, 1937, and January 17, 1938, all the disputes then remaining unsettled were submitted by the petitioners to the Secretary of the Interior as "unauthorized requirements" of the contracting officer (Plaintiffs' Exhibit "J," pp. 22-41, 42-54; R. 135-140, 143.[2] The Acting Secretary of the Interior turned the submission of November 22, 1937, over to the contracting officer "with instructions that he proceed in accordance with Article 15 of the contract." The petitioners were then informed by the Acting Secretary of his disposition of the claims (R. 140-141). Thereupon the petitioners wrote the Secretary in effect that they were not invoking Article 15 in their presentations as they believed it to be without binding force and effect in those respects and that they had submitted the matters to him as the administrative departmental head authorized by law to contract for the construction of the dam and from whom the requirements of officials of the Department upon

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[2] A further submission of three claims and a modification of one claim previously submitted was made by the petitioners April 13, 1938, and statements of damage on each of the claims were submitted at various dates from March 4, 1938, to May 3, 1938. These submissions were made to the contracting officer rather than to the head of the department upon the suggestion of the Secretary of the Interior (R. 141).

the dam are presumed to emanate (R. 141-142). They added, however, that this difference in view as to the capacity in which the Secretary might act in these respects seemed to raise no issue at the time as the petitioners wished to reach an administrative settlement and the methods and procedure to be adopted and the officials to bring the matters under departmental consideration were for the Secretary's determination (R. 142). Subsequently, the petitioners were informed by the Secretary that their letter of January 17, 1938, had likewise been sent to the contracting officer for consideration in connection with the "Findings of Fact" to be prepared by him under Article 15 (R. 144).

Under these circumstances, where many of the disputes had already been the subject of formal decision by the contracting officer, where some of these disputes had been formally appealed to the Secretary of the Interior without result, where other disputes had been protested to the contracting officer months and years before without decision, and where the petitioners informed the Secretary that they did not regard their submissions of November 22, 1937 and January 17, 1938, to him as invoking Article 15, the contracting officer proceeded to a consideration of all the disputes. On December 5, 1938, he rendered his written decision affirming all his prior decisions and requirements except in one lesser respect.

The petitioners appealed the decision of the contracting officer to the Secretary January 4, 1939, "without recognition of any supposed requirement therefor and *with full reservation of the contractor's rights to have all issues adjudicated by the proper courts*" (Emphasis supplied.) (R. 170). No communication was had by the petitioners from which they might have been advised that the Secretary would consider their appeal upon any different conditions from those stated by them to him in transmitting their

appeal. It was this appeal that the petitioners abandoned, as he court below found, by entering suit in the Court of Claims May 1, 1939, when neither the Secretary nor his representative, the solicitor of the Department, had yet made any determination of the time when their consideration of the appeal would commence.

It is manifest upon this state of established facts that the petitioners had set up and proved in the Court of Claims justification for not completing the procedure of Article 15 for administrative settlement of disputes arising under their contract. If the effect of Article 15 be that of a transfer of jurisdiction from the Court of Claims to the Administrative authorities, or if it be that of a condition upon the court's jurisdiction that the contractor merely exhaust his contractual remedies before turning to the Court of Claims for relief, it is plain that prevention of performance of the contractors' obligation by the government removes any bar to a condition upon adjudication of the claims upon their merits by the Court of Claims.

It follows, then, that this Court should decide whether the Court of Claims was correct in denying adjudication of petitioners' claims upon their merits without findings as to the inadequacy of the appeal procedure established by Article 15 of the contract.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SAMUEL T. ANSELL,
Counsel for Petitioners.

May 3, 1946.

APPENDICES

The contract, the specifications, the drawings, Change Order No. 1, the Adjustment of Compensation, and the Findings of Fact and Decision of Contracting Officer, have been certified as a part of the record by the Court of Claims and are filed with the Clerk of the Court. The parties have stipulated that they need not be printed in this Court. The pertinent portions of these documents are reproduced as follows:

APPENDIX "A"

CONTRACT I2r-4359

Art. 15. Disputes.—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

APPENDIX "B"

SPECIFICATIONS No. 570

14. *Protests.* If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within ten (10) days after the date of receipt of the written instructions or decision, he shall file a written protest with the

contracting officer, stating clearly and in detail the basis of his objections. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions and/or decisions of the contracting officer contained in letters transmitting drawings to the contractor shall be considered as written instructions or decisions subject to protest or objection as herein provided.

APPENDIX "O"

CHANGE ORDER No. 1

(Exhibit "B" Annexed to Petition)

Washington, D. C., June 5, 1935.

ORDER FOR CHANGES No. 1

Silas Mason Company, Inc.,
Walsh Construction Company, and
Atkinson-Kier Company,
Mason City, Washington.

GENTLEMEN:

Additional information having become available it is found desirable, in pursuance of the provisions of Article 4 of the contract with you dated July 16, 1934 (Symbol No. I-2r-4359), and in pursuance of the provisions of paragraph 24 of specifications No. 570 forming a part thereof, to change the dimensions and design of the Grand Coulee Dam and power plant to meet such conditions. In the opinion of the contracting officer those changes are necessary and desirable.

In lieu of constructing the Grand Coulee Dam and the appurtenant works in accordance with the drawings and specifications No. 570 you are directed to construct the dam and appurtenant works in accordance with the revised designs as shown on the attached general drawings Nos.

222-D-751, 752, and 753. Other drawings showing additional details will be furnished for construction purposes. The principal changes involved are as follows:

• • • • • • •

All work shall be done under the detailed instructions contained in specifications No. 570 where these are applicable as determined by the contracting officer and otherwise in accordance with the detailed instructions and drawings which will be furnished by the contracting officer.

Compensation for the work involved as a result of this order shall be made in pursuance of the provisions of paragraph 24 of specifications No. 570 and (or) the provisions of Article 4 of the contract. The time within which to submit claims for adjustment of compensation shall be 60 days from the date of receipt of this order, unless the contracting officer for proper cause shall extend such time.

Very truly yours,

(S.) R. F. WALTER,
Chief Engineer, Bureau of Reclamation.

Approved, May 24, 1935.
(S.) ELWOOD MEAD,
Commissioner of the Bureau of Reclamation.

Approved, June 5, 1935.
(S.) HAROLD L. ICKES,
Secretary of the Interior.

APPENDIX "D"

FINDINGS OF FACT AND DECISION OF CONTRACTING OFFICER (Plaintiffs' Exhibit "J", pp. 234-236, 243, 244, 245, 246, 247, 250-251, 256-258).

FINDINGS OF FACT AND DECISION OF CONTRACTING OFFICER ON CLAIM No. 6

Damages to the Contractor resulting from Grout Pipe becoming clogged because of a defective design provided by the Government, and Damage because of a requirement

by the Government that the Contractor perform work not required by the Specifications to prevent grout pipe from becoming clogged."

Amount Claimed	In	Date
$34,401.73	Original Claim	Feb. 14, 1938
$34,401.73	Final Release	Mar. 21, 1938
$29,298.43	Statement of Damages	Mar. 4, 1938

1. The contractor's claim is for remission of penalties assessed on account of clogged grout pipe, and for additional compensation for work done to keep the pipes from becoming clogged. The contractor's contention is that the pipes became clogged through no fault of its own, but chiefly because of failure of the grout stops, which were designed by the Government, and that the work necessary to keep the pipes open, consisting of circulation of water through the grout pipe system, was extra contractual.

2. Paragraph 73 of specifications no. 570, entitled "Contraction joints", reads in part as follows:

> "* * * contraction joint sealing strips consisting of non-corrosive metal sheets equivalent to No. 20 U. S. Standard gage in thickness shall be placed in each contraction joint as shown on the drawings or as directed by the contracting officer. The sealing strips shall be carefully joined together by brazing or welding so as to form a continuous water-tight diaphragm in each contraction joint. Adequate provisions shall be made to support and protect the sealing strips during the progress of the work. The contractor shall replace or repair at the contractor's expense any sealing strip punctured or damaged before final acceptance of the work * * *"

Paragraph 74 of specifications no. 570, entitled "Pipe for grouting Contraction Joints," reads in part as follows:

> "* * * Great care shall also be taken to insure that all parts of the system are maintained free from dirt and other foreign substances. All pipe and fittings shall be thoroughly cleaned immediately before con-

crete is placed about them. After each lift of the grouting system is placed and before any concrete is placed around it, and at such other times as the contracting officer may direct, the pipe shall be tested by forcing a current of air under pressure through it to the satisfaction of the contracting officer, after which it shall be immediately temporarily capped or otherwise closed to avoid the possibility of any foreign substance entering it until it is pressure grouted. Any pipe that becomes clogged before final acceptance of the work, due to any cause, shall, if practicable, be cleaned or opened up to the satisfaction of the contracting officer. For any pipe which the contractor fails to open up or to replace to meet this test the contractor shall pay to the Government as fixed, agreed, and liquidated damages the sum of two dollars ($2.00) per linear foot of the total length of pipe which is thereby made ineffective as determined by the contracting officer."

3. When the contractor installed the metal grout stops prescribed by paragraph 73 of specifications no. 570, they were often improperly embedded and holes were sometimes punctured in the seals after being placed; imperfect tamping was done, causing porous concrete in contact with the seals, and in many cases the grout pipes were improperly hooked up by inexperienced laborers. Because of this faulty installation, and also because of natural seepage through shrinkage cracks in the concrete, grout from the "C" hole grouting operations sometimes got into the grout pipes of the dam. When grout entered the grout pipes in this manner it was ordinarily washed away by the water circulation method, but on numerous occasions the contractor failed to have facilities immediately available for washing out pipe before the grout solidified and, even when such facilities were available, there was often a failure to do any such washing, or to do it in a careful and workmanlike manner. When this occurred, clogging of the grout pipes usually resulted and in such cases the contractor was advised, in accordance with paragraph 74 of specifications no. 570 quoted above, of the assessment of liquidated damages at $2.00 per foot for the lengths of piping clogged.

4. A resume of the assessments made for clogged grout pipes of the contraction joint grouting system (not including the wash pipe serving the grout grooves) is as follows:

Date of		Length Pipe Clogged	Amount of Assessment	Contractor's Claim for Remission of Assessment
Letter	Protest			
Oct. 22, 1936	Nov. 7, 1936	231.8 ft.	$463.60	$463.60
Oct. 27, 1936	May 1, 1937	340.0 ft.	680.00	680.00
Nov. 7, 1936	May 1, 1937	85.0 ft.	170.00	170.00
Nov. 27, 1937	Dec. 8, 1937	271.8 ft.	543.60	543.60
Jan. 27, 1938	Feb. 10, 1938	54.4 ft.	108.80	.....
			$1,966.00	$1,857.20

Note: It will be noted from the next to the last paragraph of the contractor's letter of February 10, 1938, that it accepts responsibility for the clogging of the 22 feet of pipe in block 31C. The contractor now advises verbally that it omitted including in its claim the remission of the penalty assessed for the 32.4 feet of clogged pipe in block 41A. This accounts for the difference of $108.80 in the total of the contractor's claim and the total of penalties assessed.

5. Early in the concrete placing program the contractor's field forces requested permission to circulate water through the contraction joint grouting system, instead of first testing it with air and then washing it out if it was found to be clogged. This proved to be the cheapest and most practicable way of protecting the grout pipes during the "C" hole grouting, and was therefore continued during those operations. Because of the success of this method, the change was satisfactory to the Government. The cost of this operation was not substantially greater than the method of air testing and washing, and its 100 percent efficiency in preventing clogging of grout pipes meant a saving in both money and time to the contractor.

6. The contractor is entitled to no additional compensation by reason of this claim and the contractor's claim is denied.

APPENDIX "E"

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Coulee Dam, Washington

October 22, 1936

Mason-Walsh-Atkinson-Kier Company,
Mason City, Washington.

GENTLEMEN:

During grouting operations of the "C" hole at Station A5/93 completed September 8, 1936, grout entered the transverse joint at Station A6/24 between blocks 9 and 10, clogging the lines and making ineffective a portion of the grouting system for the above joint.

A print of drawing R2-1094-1 is enclosed, showing a portion of the grouting system at transverse joint A6/24 mentioned above. From a field report of observations made during the grouting operations and of subsequent water tests made from the auxiliary header upstream from the gallery at elevation 950, it is evident that the grouting system is ineffective below elevation 940 at block 10A, and that the 1½" header from rock to elevation 950 adjacent to the longitudinal joint at Station 19/77 is also clogged.

Under the provisions of paragraph 74 of Specifications No. 570 and of paragraph 15 of specifications accompanying Order for Change No. 1 of your contract (symbol I2r-4359), liquidated damages at the rate of two dollars ($2.00) per lineal foot for 231.8 feet of clogged grout pipe, or a total of $463.00, were deducted from payments under your September, 1936, estimate. Items of this deduction are as follows:

Elev. top of pour	Length of pipe in pour
920	14.2 ft.
925	57.2 "
930	68.4 "
933	30.0 "
940	30.0 "
1½ header in 10B	32.0 "
	231.8 "

If this pipe is opened up and made effective prior to final acceptance of the work under your contract, the above charge will be cancelled.

Very truly yours,

F. A. BANKS,
Construction Engineer.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Coulee Dam, Washington

October 27, 1936.

Mason-Walsh-Atkinson-Kier Company, Mason City, Washington.

Clogged grouting system—Sta. A12/14

GENTLEMEN:

The 1½" return header for the transverse joint between blocks 25 and 26, axis station A12-14, serving from rock to elevation 900, is found to be clogged. Neither the exact date of clogging nor the cause of the clogging is definitely known, but it was discovered when a water test was applied to the header just prior to placing of concrete to elevation 880 in Block P7A on June 16, 1936. A recent test with water pressure was unsuccessful in opening up the return header.

Three hundred and forty (340) lineal feet of the grout pipe is rendered ineffective by this plugging, from the downstream end of the return header to the grouting and drainage gallery in block 26A as shown on the attached drawing R2-1094-3.

Under the provisions of paragraph 74 of specifications No. 570, and of paragraph 16 of specifications accompanying Order for Change No. 1 of your contract (symbol I2r-4359), liquidated damages at the rate of two dollars ($2.00) per lineal foot for 340 lineal feet of clogged grout pipe as

outlined above, or a total of Six Hundred Eighty Dollars ($680.00), will be deducted from your October, 1936, estimate.

If this pipe is opened up and made effective prior to final acceptance of the work under your contract, the above charge will be cancelled.

Very truly yours,

F. A. BANKS,
Construction Engineer.

Encl.

Mason City, Washington

November 7, 1936.

Mr. F. A. Banks, Construction Engineer, Bureau of Reclamation, Coulee Dam, Washington.

DEAR SIR:

We note that a deduction of $463.60 was made from our September estimate as liquidated damages at the rate of $2.00 per foot applied to 231.8 feet of grout pipe found to be ineffective. Your letter of October 22nd explains that the stoppage of this pipe occurred during the grouting of the "C" holes.

It has been our understanding that the liquidated damage penalty was intended to apply to the installation of the piping for the grouting system, and we have been very careful to test all installed piping, both before and after being covered with concrete. As a matter of routine, all risers and headers have been blown out under the supervision of your inspection force. The pipes now found to be clogged were tested in this manner and found to be clear up until the grouting of the "C" holes was begun. There seems to us a reasonable doubt whether we should be held responsible for the stoppage of the piping system caused by entry of grout from the "C" hole foundation grouting. The fact is that we spent a great deal of money maintaining the water flow through the joints to wash out any grout which might enter from the foundation.

Under these circumstances, we request that you reconsider your decision to apply liquidated damages in this case. The same reasoning applies to the stoppage of the headers between blocks 25 and 26 referred to in your letter of October 27th. Presumably, this is another case of stoppage from the foundation grouting, inasmuch as this header was found to be open when tested a short time before the grouting was started. The stoppage was discovered at the first test made after the grouting had commenced.

Yours very truly,

MASON, WALSH, ATKINSON, KIER COMPANY,
Geo. H. Atkinson, Job Manager.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Coulee Dam, Washington

December 1, 1936.

Mason-Walsh-Atkinson-Kier Company, Mason City, Washington.

GENTLEMEN:

A portion of the 1½" supply header is clogged that serves the longitudinal joint at station B19/34 in blocks 18 to 26 inclusive from bedrock to elevation 900. The 1½" supply header connection to the gallery at elevation 900 in block 22 is also clogged.

A print is inclosed of drawing R2-1094-3, showing the grout pipe layout for this joint. A study of this layout indicates that 40 linear feet of pipe in the supply header is ineffective between axis stations A10/95 and A11/27 in addition to 45 linear feet in the riser to the gallery, a total of 85 linear feet.

Under the provisions of paragraph 74 of specifications No. 570 and of paragraph 16 of specifications accompanying Order for Change No. 1 of your contract (symbol I2r-4359),

liquidated damages at the rate of Two Dollars ($2.00) per linear foot for 85 linear feet of clogged grout pipe as outlined above, or a total of One Hundred and Seventy Dollars ($170.00), will be deducted from your estimate for December, 1936.

If this pipe is opened up and made effective prior to final acceptance of the work under your contract, the above charge will be cancelled.

Very truly yours,

F. A. BANKS,
Construction Engineer.

Incl.
2 cc—Denver

Mason City, Washington

May 1, 1937.

Mr. F. A. Banks, Construction Engineer, Bureau of Reclamation, Coulee Dam, Washington.

DEAR SIR:

In reviewing our files, we find the following references advising us of the assessment of liquidated damages on account of the stoppage of grout piping:

Your letter of October 22, 1936, Liquidated Damages	$463.60
Your letter of October 27, 1936	680.00
Your letter of December 1, 1936	170.00
Total	$1313.60

Our position with respect to these deductions was expressed in our letter of November 7, 1936. We consider that our responsibility is discharged when the piping has been installed and tested and capped after embedment and found by your inspectors to be in accordance with the plans and specifications. We cannot accept the responsibility for stoppage of the piping due to the "C" hole grouting, espe-

cially in view of the fact that we have installed the grout stops and tested them in the specified manner. In a separate letter of this date we are asking you to assume the cost of such measures as you consider necessary to prevent further stoppage.

We hereby file claim for refund of liquidated damages in the amount of $1313.60, which has been deducted from our estimates.

Yours very truly,

MASON-WALSH-ATKINSON-KIER COMPANY.
(S.) GEO. H. ATKINSON,
Job Manager.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Denver, Colorado

June 1, 1937.

Silas Mason Company, Inc.,
Walsh Construction Company, and
Atkinson-Kier Company,
Mason City, Washington.

GENTLEMEN:

Reference is made to your letter of May 1, 1937, addressed to the construction engineer, Coulee Dam, Washington, protesting the deduction of liquidated damages on account of the stoppage of grout piping which is being installed under contract No. I2r-4359, dated July 16, 1934, for construction of Grand Coulee Dam, Columbia Basin Project.

You have presented a claim for the remission of liquidated damages assessed under the provisions of paragraph 74 of specifications No. 570 and paragraph 16 of the specifications attached to the Adjustment of Compensation under Order for Changes No. 1 on account of your failure to open up or replace grout pipe which has become clogged before final acceptance of the work.

The provisions of paragraph 74 of specifications No. 570 covering the application of liquidated damages for failure of the contractor to open up or replace grout pipe which has become clogged are identical in wording with the corresponding provisions of paragraph 16 of the specifications attached to the Adjustment for Compensation under Order for Changes No. 1 and are stated as follows:

> "Any pipe that becomes clogged before final acceptance of the work, due to any cause, shall if practicable be cleaned and opened up to the satisfaction of the contracting officer. For any pipe which the contractor fails to open up or to replace to meet this test the contractor shall pay to the Government as fixed, agreed and liquidated damages the sum of two dollars ($2.00) per linear foot of the total length of pipe which is thereby made ineffective as determined by the contracting officer."

The action of the construction engineer in deducting liquidated damages under the above quoted provisions of the contract as stated in letters addressed to you by the construction engineer under dates of October 22, 1936, October 27, 1936, and December 1, 1936, in the total amount of $1313.60, has been reviewed, and it is found that these deductions have been made in accordance with the provisions of the specifications and are mandatory under the provisions of the contract. The contracting officer is without authority to remit such deductions for liquidated damages. Your claim for remission of liquidated damages is therefore denied.

Attention is invited to the right to appeal, as provided in article 15 of the contract, which appeal if made, should be filed in the office of the Bureau of Reclamation, Denver, Colorado, within 30 days from the receipt thereof, for transmittal to the Secretary.

Very truly yours,

(S.) R. F. WALTER,
Chief Engineer.

Mason City, Washington

June 28, 1937

Mr. R. F. Walter, Chief Engineer,
Bureau of Reclamation,
Customhouse,
Denver, Colorado,

DEAR SIR:

We acknowledge receipt of your letter of June 1, 1937, in which you deny our claim for the remission of liquidated damages which have been deducted from our payments on account of stoppage of grout piping installed under contract I2r-4359. In accordance with article 15 of the contract we hereby enter our appeal from this decision to the Head of the Department.

Briefly, the facts are as follows: In letters dated October 22, October 27, and December 1, 1936, the Construction Engineer advised us that certain grout pipes had been found to be stopped and that liquidated damages at the rate of $2 per linear foot, aggregating $1313.60, would be deducted from payments due us under the contract. In each instance it is found without dispute that the pipes in question were installed in accordance with the specifications. Immediately before and immediately after embedment in the concrete and on several occasions thereafter the pipes were tested in the presence of the Government inspector and found to be clear of any obstruction. In each instance the obstruction was first discovered upon testing the system soon after the pressure grouting in the "C" holes in the nearby foundation areas was completed. It is therefore obvious that the stoppage was caused by the entry of grout under pressure from the foundation area into the contraction joints.

For the purpose of preventing the entry of grout into the contraction joints from the foundation area the design requires the installation of a grout stop on each joint near the foundation rock level. It is not in dispute that these grout stops were installed, inspected, and tested in accordance with the specifications. However, on more than one

occasion during the progress of the "C" hole grouting, we have observed positive evidence that grout was in some manner escaping past the grout stops into the contraction joints, thus proving that the design which had been executed in accordance with the plans of the specifications was not adequate to prevent this occurrence.

The assessment of liquidated damages is predicated on paragraph 74 of Specifications No. 570 which is quoted as follows:

> "Any pipe that becomes clogged before final acceptance of the work, due to any cause, shall if practicable be cleaned and opened up to the satisfaction of the contracting officer. For any pipe which the contractor fails to open up or to replace to meet this test the contractor shall pay to the Government as fixed, agreed and liquidated damages the sum of two dollars ($2.00) per linear foot of the total length of pipe which is thereby made ineffective as determined by the contracting officer."

In denying our claim for remission of damages you state that

> "• • • these deductions have been made in accordance with the provisions of the specifications and are mandatory under the provisions of the contract. The contracting officer is without authority to remit such deductions for liquidated damages."

A literal interpretation of the phrase "due to any cause" places us in the position of a guarantor of the design. This we believe to be improper, since we assumed no such obligation under the contract. An equitable interpretation would limit our responsibility to those causes which are within our control. We contend in this instance that we have executed the design in accordance with the specifications and under rigid inspection; that the quality of our workmanship is not in dispute; that the stoppage occurred by reason of the failure of the design to function as intended; and that we were powerless to prevent such failure.

It is our understanding that it is within the discretion of the Head of the Department to consider the equities of disputed questions presented to him. The denial of our claim has been predicated on the mandatory provisions of the specifications; the equity of our contention has not been challenged. We submit that in executing the design in accordance with the plans and specifications given us we have discharged our responsibility under the contract and that we cannot be equitably held responsible for the failure of the design to function as intended.

We, therefore, appeal for the remission of damages which have been assessed against us in the instances cited.

Yours very truly,

MASON-WALSH-ATKINSON-KIER COMPANY,
GEO. H. ATKINSON,
Job Manager.

(4614)

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 100

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER, *Petitioners*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the Court of Claims

PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

SAMUEL T. ANSELL,
Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

1

The Solicitor General's contention is that the decisions of this Court in respect of Article 15 dispose of this case. This must be based on the assumption either that the distinguishing facts of this case should be suppressed or compressed so as to fit into the frame of those decisions or that those decisions should be expanded by construction to cover the facts of this case.

This contention was not to be unexpected. The decisions of this Court are all one way—toward strictest literal construction. For seven years, the Solicitor General's office has contested in this Court practically every original line of interpretation of the meaning of Article 15 (and other similar provisions in government construction contracts) of the Court of Claims by which that court—up to this case—has striven to abate some of the injustices inherent in the Article; all Government requests for review have been granted; and all decisions reviewed have been reversed. *United States* v. *McShain*, cert. granted, 307 U. S. 619 (1939), reversed, 308 U. S. 512 (1939); *United States* v. *Callahan Walker Constr. Co.*, cert. granted, 316 U. S. 656 (1942), reversed, 317 U. S. 56 (1942); *United States* v. *Rice*, cert. granted, 316 U. S. 653 (1942), reversed, 317 U. S. 61 (1942); *United States* v. *Brooks-Callaway Co.*, cert. granted, 317 U. S. 615 (1942), reversed, 318 U. S. 120 (1943); *United States* v. *Blair*, cert. granted, 320 U. S. 720 (1943), reversed, 321 U. S. 730 (1944); *United States* v. *Beuttas*, cert. granted, 323 U. S. 702 (1944), reversed, 324 U. S. 768 (1945); *United States* v. *Joseph A. Holpuch Co.*, cert. granted, — U. S. —, Nos. 696 and 697, October Term, 1945 (1946), reversed, — U. S. —, Nos. 696 and 697, October Term, 1945 (1946). On the other hand, no petition for certiorari to review a decision by the Court of Claims relating to the effect of Article 15 presented by a claimant has ever been granted. *Seeds* v. *United States*, 92 C. Cls. 97; cert. den. 312 U. S. 697 (1941); *John M. Whelan & Sons* v. *United States*, 98 C. Cls. 601; cert. den. 319 U. S. 770 (1943); *Globe Indemnity Co.* v. *United States*, 102 C. Cls. 21; cert. den. 324 U. S. 852 (1945); *Standard Accident Insurance Co.* v. *United States*, 102 C. Cls. 770; cert. den. 325 U. S. 870 (1945); *George F. Driscoll Co.* v. *United States*, 104 C. Cls. 762; cert. den. — U. S. — No. 1034, October Term, 1945 (1946). The Solicitor General evidently takes the view that, since this Court has consistently corrected the Court of Claims' attempts to

discover some implications of fairness in the Article, this Court can hardly be expected to find fault with the court below when at last it decides in effect that the Article must be followed strictly to its very letter. It is our view, however, that this Court has, to some extent, recognized that this Article may have "interstices that secrete relevant implications" of fairness. We contend that the decisions of this Court do not shut the door on this case but keep it ajar for consideration of the very questions raised by the facts in this case.

We are bound to think also that this Court will be reluctant to expand its law to the extreme the Solicitor General presumes it will go. The law of Article 15 has been made by this Court; Congress has never authorized arbitration of its contracts; and it may be questioned whether Congress will ever regard with approval the Article 15 system. Moreover, whatever may be said in favor of this Article, this also can be said, as can be said of any method of covert settlement of demands by or against the Government: it is an invitation to official corruption from the humble inspector up and, at best, it necessitates honest and prudent contractors to "load" their bids.

2

The Government's brief, in defense of Mr. Ickes' conduct, seizes, as did the court below, upon counsel's statement of February 16, 1939, that the promised procedure for handling petitioners' appeal—*promised* by Solicitor Margold after 15 months' pressure on Mr. Ickes—was "entirely agreeable". The brief regards this statement as decisive. It disregards all the evidence of Mr. Ickes' unfairness and breach of duty which had been persisted in for 15 months at the time counsel made the statement and quotes with approval the statement in the opinion of the court below that "Counsel did not then think that the plaintiffs could not have a fair hearing on the appeal and, as we have con-

cluded, nothing occurred thereafter which was a reason for changing his mind".

If the text of counsel's statement be examined, certainly if it be examined in the light in which it was made, it will be seen that that statement could only mean that counsel was agreeable to Solicitor Margold's promised hearing as the best that he could get. This is far from saying that counsel agreed, or thought, that the promised hearing would be fair, or that Mr. Ickes was fair, or that Mr. Ickes' decisions would be fair. If petitioners were entitled to a hearing at all, then any hearing, however unfair, would have been justly advantageous to the petitioners: it might have curtailed Mr. Ickes' indefinite *locus poenitentiae;* it would have revealed to petitioners some knowledge of the Government's evidence; and it would have made a record which would have served to assist petitioners on their way to the courts.

What did occur thereafter?

(1) The fiasco at the Department of Justice staged by Solicitor Margold (R. 94, 117, 126, 174-175, 179-180).

(2) Solicitor Margold's visit to the Pacific Coast on February 11 for a "few weeks" which lengthened into months extending beyond the time the suit was brought (R. 94-95).

(3) Counsel's letter to the Secretary (February 27, 1939) complaining about the Department of Justice farce and the Secretary's lack of appeal procedure (R. 94-95).

(4) Acting Secretary Burlew's reply (March 9) saying that, after all, nothing had resulted except some delay in fixing a date and that "there now exists *no reason* why a date may not be set for the inauguration of the hearing", adding, "Accordingly, *in the near future*, you will be notified . . ." (italics supplied) (R. 95, 181).

(5) Failure to notify counsel as to a date either "in the near future" or at any other time (R. 95).

(6) And there also "occurred thereafter" Mr. Ickes' testimony at the hearing whereby out of his own mouth he demonstrated his utter unfairness and his insensibility to his obligation from first to last (R. 184-217).

3

The Government's brief, by misleading erroneous statements, undertakes to refute petitioners' contention that when suit was brought Mr. Ickes had had 17 months for taking up the appeals. It thus attempts to show that instead of 17 months Mr. Ickes had had only four. It is stated (Brief, 15-16):

> "Nor is there merit to petitioners' claim that the amount of time which elapsed after the filing of their appeal, without actual hearings having been begun thereon, warranted its abandonment. Petitioners filed their appeal on January 4, 1939 (Fdg. 21, R. 81-82, 170). They filed their suit in the court below May 1, 1939 (Fdgs. 24, 25; R. 1, 84-85, 96, 181), less than four months thereafter."

And footnote 5, page 16, gives emphasis to the erroneous statements. Such statements ignore the averments of the petition (pp. 21-24), supported by authentic documentary evidence, as to appeals made more than a year before the "appeal" of January 4, 1939 and also ignore the telling testimony of Mr. Harper who was speaking for the contracting officer (R. 107-108).

4

The Government's brief also takes the erroneous position that the petitioners rested their charge of the Secretary's bad faith solely upon his acrimonious communications to counsel. It states (pp. 14-15):

> "Petitioners appear to found their charge of bad faith on the part of the Secretary upon an exchange of some-

> what acrimonious letters and telegrams which took place between the Secretary and petitioners' counsel."

Petitioners rest their charges on other equally substantial grounds but these the court below, and now the Solicitor General, have chosen to ignore.

Petitioners here reiterate their charge of Mr. Ickes' bad faith and found it not only upon the Secretary's acrimonious communications but also upon the entire record evidence, including his own testimony which clearly shows—

(A) That Mr. Ickes was disqualified by his lack of fairness to pass upon the appeals (Pet. 3-4, 7);

(B) That Mr. Ickes never had an adequate appeal procedure, if, indeed, he had any at all (Pet. 4; Brief, 20-24);

(C) That Mr. Ickes himself breached his obligation to these petitioners (Pet. 7-9; Brief, 20-24).

Conclusion

The petitioners have claims which, upon the facts as found by the Commissioner (who died before completing his report on some of the causes of action), reach several million dollars. They earnestly contend that they have been denied access to the Court of Claims unjustly and unlawfully.

Respectfully submitted,

SAMUEL T. ANSELL,
Counsel for Petitioners

August 14, 1946.

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701981—46 —1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 100

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER COMPANY, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 86–98) is reported at 62 F. Supp. 432.

JURISDICTION

The judgment of the Court of Claims was entered on October 1, 1945 (R. 98–99). A motion for new trial was overruled on February 4, 1946 (R. 99). The petition for a writ of certiorari was filed on May 4, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the court below erred in denying recovery to petitioners on claims which, under Article 15 of a standard form Government contract, had been decided adversely to petitioners by the contracting officer, where petitioners had taken an appeal from that decision but, before the appeal was passed upon by the head of the department, had abandoned it.

2. Whether there was such "clear evidence" that the appeal procedure established by Article 15 was so "inadequate or unavailable" as to justify petitioners' failure to exhaust that procedure.

CONTRACT PROVISIONS INVOLVED

Article 15 of the contract involved provides:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Other pertinent provisions of the contract and specifications involved are set forth in Appendix, pp. 21–23.

STATEMENT

On July 16, 1934, petitioners entered into a contract with the United States[1] to furnish labor and materials and perform all work required for construction of the Grand Coulee Dam and Power Plant (first development) across the Columbia River in the State of Washington (Fdgs. 2, 4; R. 72). The consideration, which for the most part was dependent upon final quantities of work performed at unit prices in accordance with Specifications No. 570, was estimated at over $29,000,000 (Fdgs. 2, 3; R. 72, 86–87). Petitioners began work under the contract on October 4, 1934, and their work was completed and accepted by the Government on March 21, 1938 (Fdg. 5; R. 73).

Petitioners' contract called for the construction of a "low dam, which was the first development of the ultimately projected high dam" (Fdgs. 11, 9; R. 76, 74). On June 5, 1935, a change order, designated as Order for Changes No. 1, was sent to petitioners, by which the construction of the low dam was abandoned and petitioners were directed to construct the lower part of the high dam (Fdg. 11; R. 76). Petitioners

[1] The Government's contracting officer was R. F. Walter, Chief Engineer, Bureau of Reclamation (Fdg. 2; R. 72).

immediately proceeded to work in compliance with the change order (Fdg. 11; R. 76). On August 23, 1935, petitioners submitted their claim for adjustment of compensation arising out of the change order (Fdg. 12; R. 77). Negotiations between representatives of petitioners and of the Government for an adjustment of compensation were carried on until December 1935, in which month the contracting officer issued an Adjustment of Compensation which was accepted and signed by each of the petitioners (Fdg. 12; R. 77). The change effected by Change Order No. 1 ulfimately increased the money consideration paid petitioners to approximately $40,000,000 (Fdg. 11; R. 76).

During the progress of the work, petitioners' representatives often discussed matters of controversy with or complained orally to the Government's inspectors and the construction engineer (Fdg. 16; R. 79–80). Such discussions or oral complaints usually resulted in a meeting of the construction engineer with representatives of petitioners "to thresh matters out and to settle the controversy. Sometimes an agreement was reached and at other times not. On a few occasions when no agreement was reached [petitioners] notified the construction engineer that claims for damages would be made. These complaints and discussions were more or less informal, without attempting to comply with the limitations

prescribed in paragraph 14 of Specifications No. 570 [Fdg. 15; R. 79; *infra,* pp. 22–23]; and, with few exceptions, no appeals were taken within the 30-day period provided in Article 15 [Fdg. 14; R. 79; *supra,* p. 2], to the head of the department" (Fdg. 16; R. 80).

On November 22, 1937, petitioners submitted to the Secretary of the Interior, who was the head of the department which had made the contract, a number of claims for additional compensation (Fdg. 17; R. 80, 135–140). These claims were referred to the contracting officer, to whom, under Article 15 of the contract (Fdg. 14; R. 79; *supra,* p. 2), the head of the department thought they should have been first presented (Fdg. 17; R. 80, 140–141). A total of 28 such claims for additional compensation were presented to the contracting officer up to February 14, 1938 (Fdg. 17; R. 80). Between March 4 and May 3, 1938, petitioners submitted to the contracting officer statements of damage on each of the claims (Fdg. 17; R. 80).

Beginning in July 1938, there ensued an exchange of letters and telegrams between counsel for petitioners and the Secretary of the Interior "which contained the respective differing views of the parties as to the proper approach and speed for the consideration of the claims then pending" (Fdg. 20; R. 81, 147–169). Counsel for petitioners, in his letters and telegrams, complained

of the amount of time being taken by the contracting officer in arriving at his decision on petitioners' claims and complained further that the contracting officer was proceeding "*ex parte*" and that it was "inferable from the action and attitude of the contracting officer that whatever finding of facts he may ultimately make will be in the nature of an attempted vindication of the position he has consistently taken in the correspondence between himself and the contractor" (R. 149). Counsel for petitioners further charged the contracting officer "with dereliction of duty and with arbitrary action" (R. 159), and called upon the Secretary of the Interior to "appoint a representative to conduct a hearing and advise you as to the propriety of our claims" (Fdg. 20; R. 81, 153). The Secretary of the Interior advised counsel for petitioners "that every effort is being made to complete the findings of fact in connection with these claims. The claims are unusual in their scope and in the amount involved and of necessity must be given careful consideration. The matter will be expedited as much as possible" (R. 153). The Secretary defended the careful scrutiny being given to petitioners' claims, suggested that petitioners' counsel "permit me to run my department in my own way," and further suggested "that the proper course for you to pursue is to let this claim take its course" (R. 159–160).

On December 5, 1938, the contracting officer made his findings of fact[2] which were, on the following day, sent to counsel for petitioners (Fdg. 18; R. 80, 169). Each of petitioners' 28 claims, except Claim No. 13, was denied by the contracting officer (Fdg. 18; R. 80–81). With respect to Claim No. 13, the contracting officer found petitioners entitled to remission of $1,099.80 which had been deducted from compensation otherwise due them, but denied the balance of the claim (Fdg. 18; R. 81, 97).

On January 4, 1939, counsel for petitioners wrote to the Secretary of the Interior that they were appealing from the findings of the contracting officer "without recognition of any supposed requirement therefor" (Fdg. 21; R. 81–82, 170). On January 19, 1939, the Secretary inquired of counsel for petitioners as to whether they desired "to submit additional evidence or argument upon the claims" (Fdg. 22; R. 82, 170). On January 26, 1939, petitioners' counsel "requested a conference with the Secretary of the Interior with reference to the procedure to be followed on the appeal" (Fdg. 23; R. 82, 171). This request was referred by the Secretary to Mr. Margold, Solicitor of the Department of the Interior, "with instructions to consider the appeal and the evidence

[2] The findings, petitioners' Exhibit J in the court below (Fdg. 18; R. 80, 98), comprised over 600 pages of mimeographed material.

submitted in support thereof, and make a report thereon to the Secretary for his consideration in making his final decision in the matter" (Fdg. 23; R. 82–83, 192). On February 6, 1939, petitioners' counsel "demanded" of Mr. Margold "the right to present oral evidence in support of the claims of his clients, as well as the right to cross-examine the contracting officer and any of his staff who had knowledge of the claims or who had advised with the contracting officer in connection therewith" (Fdg. 23; R. 83, 110–111, 171–174). Petitioners' counsel "stated at that time that it would take at least 6 weeks to complete the testimony which [they] intended to offer on their behalf" (Fdg. 23; R. 83, 113). By letter of February 11, 1939, Solicitor Margold advised petitioners that they "were accorded the privilege, without qualification, of presenting oral testimony in support of their claims, together with the privilege of cross-examining such witnesses as [the Government] might produce" (Fdg. 23; R. 83, 114, 174–175). The Solicitor's letter of February 11 also advised petitioners that unexpected circumstances had "arisen which require me immediately to leave Washington for California and may delay my return for a few weeks" (Fdg. 23; R. 83, 115, 174). On February 16, 1939, counsel for petitioners replied to the February 11 letter, stating that the Solicitor's decision as to the type of hearing petitioners would be accorded by the

Solicitor "is entirely agreeable to us" (R. 175, 117).

Further correspondence ensued between counsel for petitioners, on the one hand, and Mr. Margold, who was in California, and the Secretary of the Interior, on the other (R. 116–117, 176–181). On February 24, 1939, Mr. Margold informed counsel for petitioners that he would be willing to conduct the hearing on petitioners' claims "in the afternoons, * * * daily except Saturdays, Sundays, and holidays" (R. 116, 177–178). For the purpose of making arrangements, Mr. Margold referred counsel for petitioners to the Acting Solicitor and agreed to "abide by any decision he may make on my behalf with respect to any matter that may arise on which you would feel it necessary to consult me personally, were I in Washington" (R. 178, 118). By letter of March 9, 1939, the Acting Secretary of the Interior repeated to counsel for petitioners that petitioners would be "granted 'a full and complete hearing of the merits of this controversy'" and would "'be at liberty fully to present all the oral and written testimony you deem pertinent to your case and to cross-examine any witness or witnesses that may be offered on behalf of the Government'" (R. 181). The Acting Secretary further advised counsel for petitioners that

> there now exists no reason why a date may not be set for the inauguration of the hear-

> ing. Accordingly, in the near future you will be notified by the Solicitor as to a date which is agreeable to him and advised as to the procedure which is deemed appropriate. Your desires with regard to any alteration in the established date, as well as any details concerning the procedure to be followed, will, of course, be given full consideration. (R. 181.)

Solicitor Margold did not return to Washington, D. C., until May 11, 1939 (R. 95, 118). On May 1, however, petitioners brought this suit in the Court of Claims (Fdgs. 24, 25; R. 1, 84–85) and, by letter of that date, advised the Secretary of the Interior that they had done so (Fdg. 24; R. 84, 181). On May 24, 1939, the Secretary wrote to counsel for petitioners (Fdg. 25; R. 84–85, 182–183, 193), referring to petitioners' appeal to the Secretary from the contracting officer's findings (R. 182), reciting the negotiations that had occurred between counsel for petitioners, on the one hand, and the Secretary and the Solicitor, on the other, with reference to the procedure to be followed in connection with such appeal (Fdg. 25; R. 84, 182–183), and concluding:

> Inasmuch as you have commenced an action in the Court of Claims, involving the same items as those embodied in your claim before the Department, before I have had sufficient opportunity either to arrange for such a hearing as you requested or to review the findings of the contracting officer,

> and in view of the conditions upon which your so-called appeal was presented, it is assumed that you have elected to forego whatever rights you may have by way of appeal to me from the contracting officer's decision under Article 15 of the contract, and that no further action by me will be necessary in the matter (Fdg. 25; R. 84–85, 183).

This letter was not answered (Fdg. 25; R. 85, 193).

The court found:[3]

> It has not been proved that the conduct of the contracting officer was arbitrary or capricious or lacking in good faith. * * *

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[3] The original petition in the court below was filed by petitioners on May 1, 1939 (Fdgs. 24, 25; R. 1, 84–85). On January 8, 1940, the Government's demurrer was sustained and the petition dismissed (R. 1, 10) on the ground that petitioners "did not exhaust their remedies under the contract when a decision was rendered against them" (R. 10). On February 14, 1940, petitioners, pursuant to leave granted, filed an amended petition (R. 10–70), the petition upon which this case was heard in the court below. Petitioners alleged, *inter alia*, the invalidity of Article 15 of the contract (Fdg. 14; R. 79; *supra*, p. 2) and of paragraph 14 of Specifications No. 570 (Fdg. 15; R. 79; *infra*, pp. 22–23); the arbitrary, capricious, and erroneous action of the contracting officer; the arbitrariness and hostility of the head of the department; and the failure of the head of the department to decide the appeals (R. 15–16); and sought judgment in the amount of $5,283,526.28. The Government filed a demurrer to the amended petition also (R. 70). On November 12, 1940, the court below, "desiring to be more fully informed as to the facts in the case," overruled the demurrer "without prejudice to any legal questions involved" (R. 70–71). The Government thereupon filed a general traverse (R. 71).

> The Secretary of the Interior, who was the head of the department mentioned in Article 15 of the contract, did not refuse or fail to entertain an appeal by the [petitioners] from the decisions of the contracting officer. The postponement of the beginning of hearings on the appeal which occurred in the early months of 1939 was not, in the circumstances, unreasonable or inconsiderate of [petitioners'] interests. (Fdg. 26; R. 85.)

The court held that on the basis of the evidence it "could not possibly make * * * a finding" that the contracting officer had been derelict in his duty (R. 92), that under Article 15 of the contract "the Government had a right" to have petitioners bring their "evidence to the attention of responsible officials of the Department" "to give it an opportunity to avoid the delay and expense of litigation" (R. 97), and, therefore, that petitioners "were required to submit all the disputes upon which this suit is based, to the stipulated administrative procedure" (R. 97). Judgment was entered for petitioners in the amount of $126,219.80 (R. 86, 98–99).[4]

[4] The judgment comprises two items: (1) $1,099.80 which the contracting officer had allowed petitioners as part of their Claim No. 13 (Fdgs. 18, 28; R. 81, 85, 97; *supra*, p. 7); and (2) $125,120 which the contracting officer had deducted from compensation otherwise due petitioners with the expectation that the Government would spend the money to repair certain drainage facilities which the contracting officer claimed had been improperly installed by petitioners (Fdg. 29; R.

ARGUMENT

The decision below was clearly correct. Article 15 of the contract (Fdg. 14; R. 79; *supra*, p. 2) directed that all "disputes [except "labor issues"] concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions." It is now well settled that this provision in Government construction contracts provides "the only avenue for relief" available for the settlement of disputes arising thereunder (*United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735), and that a contractor

85–86, 98). With respect to item (1), the court below held that under Article 15 the decision of the contracting officer was final (R. 97). With respect to item (2), the court below found that "The need for the repair did not develop, and it is now known, though it was not known when the contracting officer made his decision, that the repair will never be made" (R. 98). The court accordingly held that petitioners "did not lose their right in this claim by their failure to appeal from this decision, because the abandonment of the Government's intention to spend the money to repair the drainage facilities, which abandonment gave the [petitioners] a right to the money regardless of the merits of the controversy in other respects, did not occur until after the period for appeal had expired" (R. 98). Neither item is presently in controversy.

who, having accepted and agreed to Article 15, chooses not to pursue and exhaust its procedure to obtain relief, may not thereafter sue to recover damages in the Court of Claims. *United States* v. *Joseph A. Holpuch Co.*, Nos. 696 and 697, October Term, 1945, decided May 20, 1946. We believe that the *Callahan Walker, Blair,* and *Holpuch* cases are dispositive of the instant case.

1. Petitioners, while not conceding their obligation to have pursued the procedure of Article 15 prior to bringing suit in the Court of Claims, contend that in any event they were justified in abandoning their appeal. They rest their justification on the alleged bias and prejudice of the Secretary of the Interior (Pet. 14, 17–18, 20) and, apparently, on the amount of time which elapsed after the filing of their appeal without actual hearings having been begun thereon (Pet. 12, 14, 23–24). Neither ground, however, finds support in the evidence. And, as this Court has held, "in the absence of some clear evidence that the appeal procedure [provided by Article 15] is inadequate or unavailable, that procedure must be pursued *and exhausted* before a contractor can be heard to complain in a court." *United States* v. *Joseph A. Holpuch Co.*, Nos. 696 and 697, October Term, 1945, decided May 20, 1946, slip opinion, p. 4. [Italics supplied.]

Petitioners point out that the court below "avoided making any finding as to the bad faith on the part of Secretary Ickes" (Pet. 18). Peti-

tioners appear to found their charge of bad faith on the part of the Secretary upon an exchange of somewhat acrimonious letters and telegrams which took place between the Secretary and petitioner's counsel. This exchange, however, occurred while petitioners' claims were pending before the contracting officer and the entire burden of petitioners' complaint at that time was that the contracting officer was biased and that only the Secretary or his "representative" could afford petitioners appropriate redress (Fdg. 20; R. 81, 149–153, 156–159, 163, 166). It was after the exchange had taken place that petitioners appealed to the Secretary from the findings of the contracting officer (Fdgs. 20, 21; R. 81–82, 96, 170), and also after that exchange that counsel for petitioners advised both the Secretary and the Solicitor of the Department of the Interior that the procedure determined upon by the Solicitor with respect to the handling of the appeal was "entirely agreeable" to petitioners (R. 96, 175). As pointed out by the court below, "Counsel did not then think that the [petitioners] could not have a fair hearing on the appeal and, as we have concluded, nothing occurred thereafter which was a reason for changing that opinion" (R. 96).

Nor is there merit to petitioners' claim that the amount of time which elapsed after the filing of their appeal, without actual hearings having been begun thereon, warranted its abandonment.

Petitioners filed their appeal on January 4, 1939 (Fdg. 21; R. 81–82, 170). They filed their suit in the court below on May 1, 1939 (Fdgs. 24, 25; R. 1, 84–85, 96, 181), less than four months thereafter.[5]

Within that four-month period, counsel for petitioners conferred with the Solicitor of the Department of the Interior (Fdg. 23; R. 83, 109–112, 172) and engaged in an exchange of correspondence with the Solicitor and with the Secretary of the Interior (Fdgs. 22, 23; R. 82–83, 113–117, 170–181). As a result of such communications, a procedure for handling petitioners' appeal was decided upon which counsel for petitioners characterized as "entirely agreeable" (R. 96, 175) and a schedule for conducting hearings on the appeal was suggested by the Solicitor, to which counsel for petitioners appears to have taken no exception (R. 116, 178). On March 9, 1939, the Acting Secretary of the Interior advised counsel for petitioners that "there now exists no reason why a date may not be set for the inau-

[5] Compare the assertion by petitioners in their petition (p. 12) that they brought the instant suit "over 17 months after the submission of the original 16 claims to the Secretary." Petitioners' computation of 17 months obviously dates from November 22, 1937, when they first submitted to the Secretary a number of claims which, under Article 15 of the contract, should have been first submitted to the contracting officer and which, accordingly, were referred by the Secretary to the contracting officer at that time (Fdg. 17; R. 80, 135–141).

guration of the hearing" (Fdg. 23; R. 83, 181). The setting of the date awaited only the Solicitor's return to Washington from California where he was detained on official business (Fdg. 23; R. 83, 115). Having advised counsel for petitioners by letter of February 11, 1939, that he was required to leave immediately for California and would not return "for a few weeks" (Fdg. 23; R. 83, 96, 115, 174),[6] the Solicitor did not return to Washington until May 11, 1939 (R. 95, 118), ten days after petitioners filed their suit in the court below (Fdgs. 24, 25; R. 1, 84–85, 96, 181). But, as stated by the court below (R. 96).

> For a "few" weeks to turn out to be eleven, the time between February 11 and May 1, when counsel filed this suit, is not so unusual in the experience of lawyers that counsel had any reason to suppose that the delay indicated a repudiation by the Solicitor of his agreement to conduct a hearing, and to proceed upon that supposition without any inquiry as to what the facts were.

2. Nor does the bad faith which petitioners charge to the contracting officer justify their failure to exhaust the appeal provisions of Article 15. For even assuming the bad faith, arbitrariness, or dereliction of duty of the contracting offi-

[6] Later, counsel for petitioners were advised that the Solicitor would "be absent from Washington for some six weeks" (R. 176).

cer, an assumption the court below found not supported by the evidence (Fdg. 26; R. 85, 90–92), the procedure of Article 15 "provided a complete and reasonable means of correcting the abuses." *United States* v. *Blair,* 321 U. S. 730, 735. As this Court stated in that case (*ibid.*):

> Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause * * *.

See also *United States* v. *Joseph A. Holpuch Co.,* Nos. 696 and 697, October Term, 1945, decided May 20, 1946.

3. Petitioners question (Pet. 2) the applicability of Article 15 to questions of law arising under the contract. Unlike the Article 15 contained in some Government construction contracts which is limited to questions of fact arising thereunder (*Cf. United States* v. *Callahan Walker Co.,* 317 U. S. 56) the Article 15 here involved (Fdg. 14; R. 79; *supra,* p. 2) is not so limited. *Cf. United States* v. *McShain,* 308 U. S. 512, 520–521; *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Beuttas,* 324 U. S. 768; *United States* v. *Joseph A. Holpuch Co.,* Nos. 696 and 697, Oc-

tober Term, 1945, decided May 20, 1946. This Court, without having explicitly drawn any distinction between the two types of Article 15 (see *United States* v. *Beuttas,* 324 U. S. 768, 772), has upheld the finality of administrative determinations made thereunder. And this Court did hold in the *Holpuch* case, *supra,* that "Article 15 is controlling as to *all* disputes 'concerning questions arising under this contract' *unless otherwise specified in the contract*" (p. 4, slip opinion; italics supplied). Moreover, whatever may be the finality of Article 15 with respect to pure questions of law and whatever may be the validity of petitioners' contention that issues between them and the Government were issues of law as distinguished from issues of fact, it is clear that Article 15 validly requires the exhaustion of the administrative remedies made available therein. If this were not so, the Government would be denied the opportunity to correct the improper action of subordinate officials. *United States* v. *Joseph A. Holpuch Co.,* Nos. 696 and 697, October Term, 1945, decided May 20, 1946; *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Callahan Walker Co.,* 317 U. S. 56. Only if petitioners had exhausted rather than abandoned the appeals procedure provided by Article 15 and thus afforded the head of the department the opportunity provided by the contract to correct the claimed abuses of the contracting officer could they be

heard to assert the lack of finality of determinations under Article 15 concerning questions of law. Compare *United States* v. *Beuttas*, 324 U. S. 768, where the contractor who asserted the inapplicability of the Article 15 procedure to questions of law, actually exhausted the remedies provided by Article 15 by appealing to the department head.

CONCLUSION

The decision below is clearly correct. There is no conflict. The controversy turns largely on questions of fact, on which the court below has made findings, adverse to petitioners, that are supported by ample evidence. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
ABRAHAM J. HARRIS,
Attorneys.

JULY 1946.

APPENDIX

CONTRACT PROVISIONS

Art. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Art. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to

such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

SPECIFICATIONS

Paragraph 14 of Specifications No. 570 reads as follows:

Protests.—If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within ten (10) days after the date of receipt of the written instructions or decision, he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his objections. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions

and/or decisions of the contracting officer contained in letters transmitting drawings to the contractor shall be considered as written instructions or decisions subject to protest or objection as herein provided.

Paragraph 24 of Specifications No. 570 provided as follows:

Right to change location and plans.—When additional information regarding foundation or other conditions becomes available as a result of the excavation work, further testing, or otherwise, it may be found desirable to change the location, alignment, dimensions, or design of the dam or power plant to meet such conditions. The Government reserves the right to make such reasonable changes as, in the opinion of the contracting officer, may be considered necessary or desirable, and the contractor shall be entitled to no extra compensation because of such changes, except that any increase in the amount of excavation, concrete, or other required work, for which items are provided in the schedule, will be paid for at the unit prices bid therefor in the schedule. The contractor's plant shall be laid out and his operations shall be so conducted as to accommodate any reasonable change in the location and design of the dam and power plant, or any part thereof, without additional cost to the Government.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 100

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER COMPANY, *Petitioners*,

v.

THE UNITED STATES

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SAMUEL T. ANSELL,
Counsel for Petitioners

Washington, D. C.,
November 7, 1946

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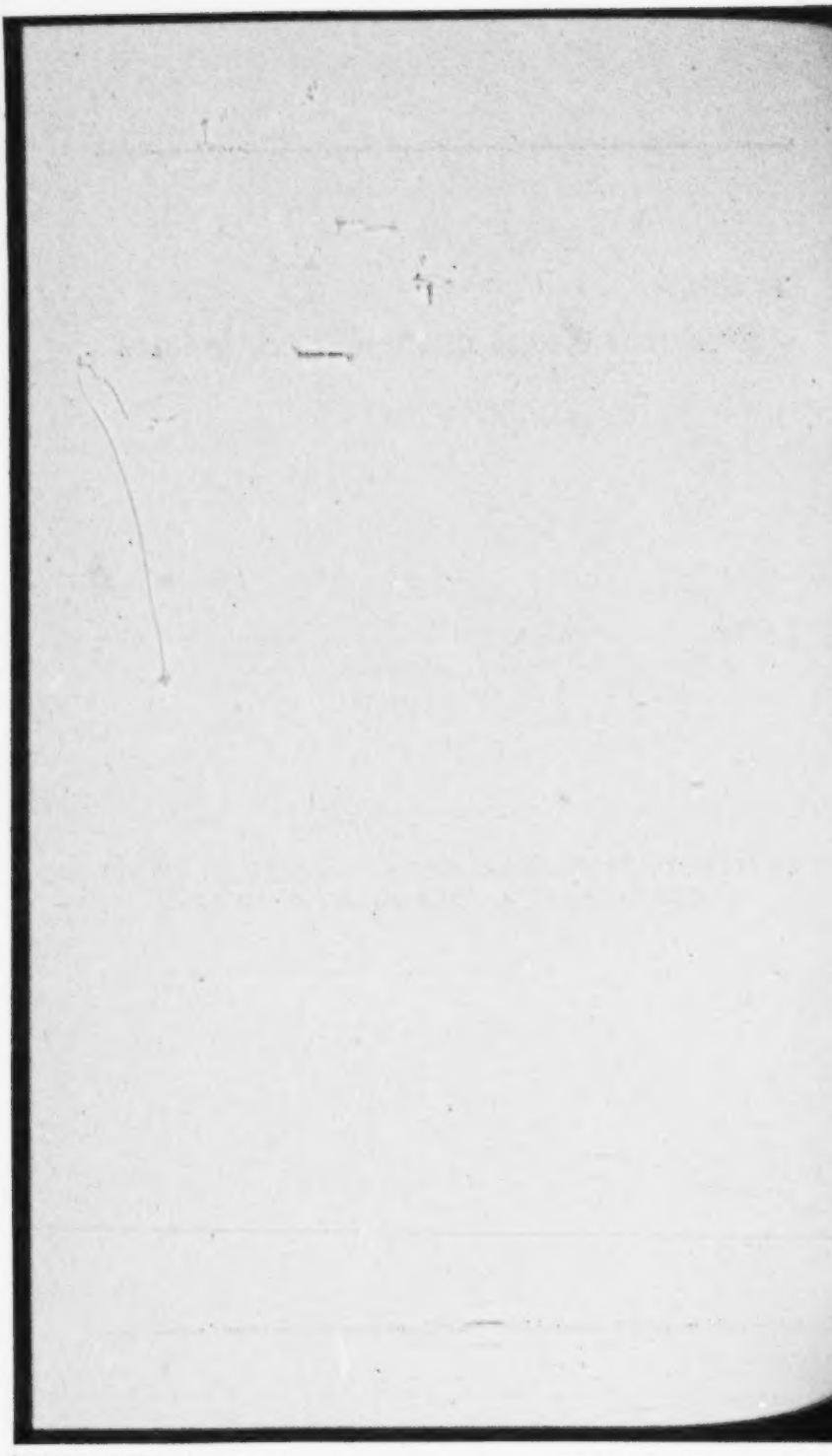

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THE UNITED STATES

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioners respectfully request this Court to reconsider its denial, October 14, 1946, of their petition for certiorari to the Court of Claims. They have been denied payment of several million dollars for work which they did on the Grand Coulee Dam by the orders of P. W. A. Administrator Ickes and his contracting officer. The Court of Claims denied petitioners the right to a judicial decision in that they did not first fully prosecute their appeals to Mr. Ickes, as required by Article 15 of the P. W. A. form contract. Their efforts to get justice under law are set forth in their Petition for Certiorari.

I

Article 15 has no place in this case. The original contract was abrogated by Order of Mr. Ickes. All work thereafter proceeded under that Order, which carried its own requirements, specifications, drawings and rates of pay. "In lieu" of the dam the contractors had contracted to build, the Order required them to build a structure which had no similarity to the one they contracted to build. It was vastly larger; entirely different in design; required different construction methods and materials; increased the $29,000,000 consideration of the original contract to $40,000,000, exclusive of these claims. The Order was not, and did not purport to be, a modification of the original contract. The Order, with its accompanying documents, constituted a new contract which expressly adopted some of the provisions of the original contract but did not, expressly or impliedly, bring forward Article 15. This crucial point the Court of Claims ignored.

II

But, if it could be assumed that Article 15 did become a part of the Order-contract, the record indisputably shows that, while the work was in progress, the contractors did, in the manner and form required, make appeals to Mr. Ickes from the contracting officer's adverse decisions. Mr. Ickes made no disposition of these appeals. In at least one such appeal the contracting officer failed to transmit the appeal to Mr. Ickes, without the contractors' knowledge or consent. Again, more than 8 months before the job was completed, the contractors formally protested to the contracting officer his requirements of work amounting to more than $500,000, but he merely held the protests and apparently never acted on them. Further, the contractors submitted to Mr. Ickes appeals from decisions of the contracting officer amounting to approximately $1,000,000, arising near the completion of the work, but the only action Mr.

Ickes ever took upon them was formally to refer them back to the contracting officer from whose decisions the appeals had been taken. Such evidence alone—and there is much more—conclusively shows the utter futility of appealing to Mr. Ickes. This too the Court of Claims ignored.

III

The work demanded of these contractors required vast expenditures, and to ignore or delay consideration of their appeals greatly aggravated the injury done them. From as far back, at latest, as the fall of 1937, these contractors had importuned Mr. Ickes to act upon their appeals. He requited them only with abuse. He refused to move until the contracting officer, from whose decisions the appeals were made, could decide some more. Nor would he hurry the contracting officer who, according to Mr. Ickes, was too busy laying out new work to settle the old. It was not until nearly a year after the job was completed that the contracting officer, gathering all his former decisions together, sent them on to Mr. Ickes as his last word. These were but a compilation or reiteration of his former decisions. In every instance and in every item they denied the contractors' claims. Then, nearly a year after the job was completed, Mr. Ickes presumably felt free to entertain the appeals, some of which the contractors had addressed to him 16 months before. This the Court of Claims ignored.

IV

So, at last, in February 1939, a year after the job had been completed and after the contractors had been pressing Mr. Ickes for more than 15 months to hear their appeals, he designated the department solicitor to hear the appeals. The Solicitor proposed or promised a procedure for his part in handling the appeals, and this procedure counsel stated was "entirely agreeable". Such a hearing would have had some advantage. That statement the Court of Claims seized upon as wiping out all the evidence of Mr.

Ickes' unfairness which had gone before. The court said: "Counsel did not then think that plaintiffs could not have a fair hearing on the appeal and, as we have concluded, nothing occurred thereafter which was a reason for changing his mind". Much did happen thereafter—much of departmental, evasiveness and delay—which did not change, but confirmed, counsel's mind. Since the Court of Claims based its decision upon its vague conjecture as to what counsel *"did not then think"*, we may appropriately state that, after 18 months' experience with Mr. Ickes, counsel and client did not then think, and as reasonable men they could not think, that Mr. Ickes would ever give them a fair hearing. Counsel and clients, however, knew then what an examination of the evidence so conclusively shows now: Mr. Ickes was constitutionally, immutably unfair.

Respectfully submitted,

SAMUEL T. ANSELL,
Counsel for Petitioners

Washington, D. C.,
November 7, 1946.

I certify that the above is presented in good faith and not for delay.

SAMUEL T. ANSELL,
Counsel